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No. 01-____

IN THE

Supreme Court of the United States

AUGUSTINE DAVID HENDERSON
AND GREGORY FRANCIS PHILLIPS

Petitioners,

vs.

ROBERT A. STANTON, Director of the National Park Service,
JOSEPH LAWLER, Director of the National Capitol Region of the National Park Service, and
ROBERT E. LANGSTON, Chief of the United States Park Police, each in his official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When assessing claims asserted under the Religious Freedom Restoration Act, Title 42 U.S.C. § 2000-bb *et seq.*, is a court required by the statute to inquire into the importance or centrality of a burdened practice to the claimant's faith in deciding whether a challenged government action imposes a substantial burden on the affected practice?

2. Are federal courts competent to decide, in analyzing RFRA claims, whether a religious practice motivated by the faith of a claimant is important to or central to the faith of the claimant?

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PETITION FOR A WRIT OF CERTIORARI

Augustine David Henderson and Gregory Francis Phillips respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

CITATIONS TO OPINIONS AND ORDERS

The Orders of the United States Court of Appeals for the District of Columbia denying rehearing by the panel, App. 42a, and denying the suggestion of rehearing *en banc*, App. 43a, are both unpublished. The opinion of the panel explaining its denial of rehearing is reported as *Henderson v. Stanton*, 265 F.3d 1072 (D.C. Cir. 2001), App. 1a. The decision of the court of appeals affirming the judgment of the district court is reported as *Henderson v. Stanton*, 253 F.3d 12 (D.C. Cir. 2001), App. 4a. The decision of the United States District Court for the District of Columbia is reported as *Henderson v. Stanton*, 76 F. Supp. 2d 10 (D.D.C. 1999), App. 30a.

A prior decision of the court of appeals decision reversing the district court's judgment is unpublished, App. 25a. That prior district court decision, dismissing the *pro se* complaints, is reported as *Friends of the Vietnam Veterans Memorial v. Kennedy*, 984 F. Supp. 18 (D.D.C. 1997), App. 16a.

JURISDICTION IN THIS COURT

The court of appeals entered its judgment on June 26, 2001, App. 46a, and subsequently denied both the petition for panel rehearing, App. 42a, and the suggestion of rehearing en banc on October 2, 2001, App. 43a. Jurisdiction in this Court is premised upon Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The First Amendment to the Constitution of the United States is set out in the Appendix, App. 46a. The Religious Freedom Restoration Act, Title 42 U.S.C. § 2000-bb *et seq.*, is set out in the Appendix, App. 47a. The Religious Land Use and Institutionalized Persons Act, Title 42 U.S.C. § 2000-cc, is set out in the Appendix, App. 50a. Title 36 C.F.R. § 7.96, the contested regulation governing demonstrations in the parks of the National Capital Region, is set out in the Appendix, App. 59a.

STATEMENT OF THE CASE

Statement of Facts Material to Consideration of the Questions Presented

Augustine David Henderson ("Henderson") and Gregory Francis Phillips ("Phillips") are evangelical Christians, and Henderson is a licensed minister. They both sincerely believe that they have a religious duty to preach the Gospel to the whole world. For both of them, preaching the Gospel is not an option, but a vocational calling.

Obedient to that vocation, they have written, printed and distributed hundreds of thousands of leaflets, handbills, broadsides and pamphlets presenting the messages of the gospel. They have composed many songs presenting the gospel message and performed with others those songs for the public during their evangelistic outreaches on the National Mall. In addition, they have sold publications and T-shirts written or designed by Henderson, or containing content that expresses with their beliefs. For many years, Henderson and Phillips have presented their gospel message through musical performances,

preaching, and sales and distribution of religious materials on the National Mall in the District of Columbia.

The National Mall is an open parkland in the District of Columbia. The National Park Service maintains and controls the Mall. The Mall has many broad, open sidewalks and walkways. Its sidewalks and walkways are continuous through the federal corridor in the District of Columbia.

No special enclosure marks the perimeter of the National Mall. It has no gated entrances that secure access to it. Nowhere on the Mall are requirements posted for identification of persons using the Mall. The Mall has no any posted restriction imposing limitations on access. The National Mall is a typical public park, and its sidewalks and walkways are typical sidewalks.

Over the years, many large scale uses have been made of the National Mall, including mass demonstrations, Inaugural celebrations, entertainments, and cultural festivals. Those uses contrast starkly with the quietly serene, park-like setting and other aesthetic values of the National Mall. More than a few of those uses are conducted directly by the Government and its agencies. Despite their adverse impact on the aesthetics of the National Mall, the Government encourages such uses.

To carry out their religious vocation, Henderson and Phillips have obtained permits for their evangelistic outreaches on the National Mall. Their permit applications and permits have been governed by published regulations for demonstrations and special events on parklands of the National Capitol Region. Those regulations govern demonstrations and special events on federal parklands in and around the District of Columbia.

The principal regulation governing such activities is 36 C.F.R. § 7.96, App. 59. Affected parklands include the National Mall, where Henderson and Phillips have conducted outreaches for years. The regulation permits sales of certain items in connection with permitted demonstrations and special events. But, effective May 1995, the Government amended that regulation and limited items permitted to be sold to newspapers, books, buttons and bumper stickers. Before the amendment, t-shirts bearing messages related to demonstrations or special events could also be sold. Sales of prohibited items result in revocation of permits, and arrest and prosecution.

Henderson's and Phillips' religious practice of selling t-shirts bearing religious messages was prohibited by the amended regulation.

Basis of Jurisdiction in the Court of First Instance

Congress granted the district court original jurisdiction over the subject matter of the amended complaints in Title 28 U.S.C. §§ 1331 and 1343(a)(4).

Nature of The Case

Proceeding *pro se*, Henderson and Phillips brought suits to obtain declaratory and injunctive relief against an amendment of the National Park Service regulations. Both are Christian evangelists, and Henderson is a licensed minister. They, with others, conduct religious outreaches on the National Mall. Prior to the challenged amendment, as part of evangelistic outreaches they conducted on the National Mall, Henderson and Phillips sold T-shirts bearing religious messages during religious outreaches on the National Mall. As a consequence of the amendment, they were required to give up the sale of t-shirts bearing religious messages or suffer the revocation of the permits required to conduct the outreaches on the National

Mall.

Course of Proceedings

In May 1995, Henderson sued the Government over an amendment to its regulations removing message-bearing T-shirts from a list of items that he could sell during demonstrations on the National Mall. Simultaneously, he moved for a temporary restraining order seeking to set aside the modified sales regulation promulgated by the Government. Subsequently the district court deemed Henderson's case related one then pending before the district court, *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995). Henderson and the Government agreed that Henderson could continue selling T-shirts bearing religious messages on the Mall, pending the disposition of the *Friends* litigation.

In June 1995, Phillips also challenged the Government's amended regulation, and sought a temporary restraining order. The district court denied the motion, and reassigned his suit as a related case to the *Friends* litigation. Phillips and the Government also agreed that Phillips could sell T-shirts bearing religious messages on the National Mall.

In September 1995, the district court decided the *Friends* suit, concluding that the modified regulation promulgated by the Government unconstitutionally restricted the sale of message-bearing T-shirts. 899 F. Supp. at 688. The parties devised an agreement governing their conduct while the Government appealed from the decision adverse to the amendment. By that agreement, Henderson and Phillips remained free to sell T-shirts bearing religious messages, each from one location on the National Mall.

In June 1997, the United States Court of Appeals for the District of Columbia Circuit reversed the district court. *See Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997). Subsequently, the Government moved to dismiss the complaints in Henderson's and Phillips' cases. Henderson and Phillips, now represented by counsel, moved for leave of court to amend their complaints, which initially granted the motions. On reconsideration, however, the district court withdrew its previous Order, denied leave to amend and to supplement on grounds of futility, and granted the Government's motion to dismiss the *pro se* complaints. *Friends of the Vietnam Veterans Memorial v. Kennedy*, 984 F. Supp. 18 (D.D.C. 1997), App. 16a.

On appeal, the court of appeals reversed and remanded for further proceedings. *See Henderson v. Stanton*, 172 F.3d 919 (D.C. Cir. 1998) (Table), App. 25a. On remand, the Government withdrew its opposition to amendment of the complaints, and answered the Amended Complaints. Subsequently, the Government moved to dismiss those complaints or, in the alternative, for summary judgment. Henderson and Phillips opposed the motions, which were granted. *Henderson v. Stanton*, 76 F. Supp. 2d 10 (D.D.C. 1999), App. 30a. The present appeal followed.

Disposition Below

The court of appeals affirmed the district court's judgment in all respects. Although Henderson and Phillips raised the disposition of each of the claims in their amended complaints on appeal, the present Petition is limited to the decision of the court below regarding their RFRA claims.

Regarding the RFRA claim, initially the court noted that it

was concerned about the continued vitality of RFRA, but, because the Government had not pressed that position, declined to decide whether the portion of RFRA that affects federal law was severable from, and survived the demise of, the portion of the statute applicable to the States. App. 8a-9a. On the merits of the claims, the court concluded that the claims failed because Henderson and Phillips had not asserted that t-shirt sales was a practice central to, or mandatory in, their faiths. App. 10a. The court reiterated its determination of that relationship between t-shirt sales and the Petitioners' faiths:

> We are not aware of any religious group that has as one of its tenets selling t-shirts on the National mall, even if the t-shirts bear a religious message. Plaintiffs do not claim to belong to any such group, nor do they allege that selling t-shirts in that particular area of the District of Columbia is central to the exercise of their religion.
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> * * * *
>
> [P]laintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires. Their declarations do not suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate. There is no indication that they have followed--or attempted to follow--any such practice. If they had, there is no doubt that they would have come in conflict with a host of federal, state and local restrictions on commercial activities in many areas, including for instance the interiors of government buildings open to the public. Nor does the regulation significantly inhibit or constrain conduct or expression that manifests some central tenet

> of [Henderson's or Phillips's] individual beliefs. Plaintiffs have not treated selling t-shirts on the Mall as rising to that level of significance in their religion.

App. 9a-10a (citations and internal quotation marks omitted).

Henderson and Phillips filed a petition for rehearing by the panel with a suggestion of rehearing en banc. The petition brought to the attention of the court of appeals the intervening amendment of RFRA by Congress. That amendment eliminated any remaining doubt that centrality of a burdened practice to an adherent's faith was not relevant to a claim under RFRA. The panel denied rehearing and published its opinion explaining the denial of rehearing, *see* App. 1a. In explaining its denial of panel rehearing, the court of appeals stated that the amendment of RFRA by Congress did not bar examination of the importance of a burdened religious practice in determining whether a burden was substantial. App. 2a-3a.

REASONS FOR ALLOWING THE WRIT

I. SUMMARY OF ARGUMENT

Three sound reasons call for review of the decision below, as explained more fully *infra*. First, the petition presents important questions of federal law that this Court has not previously decided. Second, there is a conflict among six federal courts of appeal on the questions presented. And, third, the decision below conflicts with principles of decision identified in this Court's prior Free Exercise cases.

First, the petition for a writ of certiorari should be granted so that this Court can address important questions of federal law that it has not previously considered. The court of appeals concluded that it was appropriate for that court to inquire into

the importance to Petitioners' faiths of the Petitioners' sale of t-shirts bearing religious messages, as part of the court's determination whether the National Park Service had substantially burdened that religiously-motivated practice. App. 2a-3a. The court of appeals concluded that such sales were not important to or central to Petitioners' faiths and that, therefore, that the Petitioners had not made a prima facie showing of a violation of their rights under the Religious Freedom Restoration Act, Title 42 U.S.C. § 2000bb ("RFRA"). When confronted with the fact that Congress had recently amended RFRA to clarify that the statute did not protect only practices that were central to a faith but rather all practices motivated by religion, the court of appeals nevertheless concluded that it could inquire into "importance" under the guise of deciding substantiality of burden. App. 2a-3a.

This Court should grant review to decide whether RFRA requires, or federal courts are competent to handle, inquiry into the "importance" or "centrality" of a religious practice threatened by government action to the claimant's faith, for the purpose of determining whether the burden imposed by the government is "substantial" under RFRA. In the Free Exercise context, this Court has rejected the competence of courts to carry out that task. But this Court has not addressed the question whether, as the court below held, a contrary rule governs decision of cases under the Religious Freedom Restoration Act.

RFRA bars the federal government from substantially burdening a religious practice in the absence of a compelling government interest served by the least restrictive means. *See* Title 42 U.S.C. § 2000bb-2, App. 48a. An amendment to RFRA, effected by Congress' adoption of the Religious Land

Use and Institutionalized Persons Act of 2000, Title 42 U.S.C. § 2000-cc, *et seq.*, expressly places the question of the *centrality* of a threatened religious practice to a claimant's faith beyond legal . Nonetheless, the court of appeals engaged in exactly that inquiry. The court justified its "centrality" inquiry, conducted under the term "importance," as necessary to determining whether the burden imposed was substantial. In doing so, the appeals court construed an Act of Congress in a manner directly contrary to its terms. The question of how to construe RFRA is of great importance. This Court should grant the petition in order to resolve this important question.

Second, the petition should be granted to resolve a conflict among six federal appeals courts.

In *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996), the United States Court of Appeals for the Second Circuit held that, in deciding whether a RFRA claimant had demonstrated that a substantial burden was imposed on his exercise of religion, the scope of the court's inquiry was limited to "whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." 76 F.3d at 476. And, in *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit held that the scope of RFRA encompassed not only conduct *mandated* by a religion but also conduct *motivated* by religion. 80 F.3d at 1179. But here, the United States Court of Appeals for the District of Columbia Circuit expressly concluded that it was appropriate to decide whether a practice was "important" to a religion when deciding whether the government's actions substantially burdened that practice. App. 2a-3a, 9a-10. Like the District of Columbia Circuit, the United States Courts of Appeals for the Fourth, Ninth and Eleventh Circuits have held that a substantial burden

is one that compels an adherent to engage in religiously prohibited conduct or that forbids him to engage in religiously mandated conduct. *See Goodall by Goodall v. Stafford County School Board,* 60 F.3d 168, 172-73 (4th Cir. 1995); *Cheffer v. Reno,* 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez,* 46 F.3d 948 (9th Cir. 1995) (*per curiam*).

The conflict between the Second and Seventh Circuit, on one side, and the Fourth, Ninth, Eleventh and District of Columbia Circuits, on the other, warrants this Court's grant of plenary review so that the conflict may be resolved.

Finally, third, the decision of the court of appeals conflicts with the decisions of this Court. In enacting RFRA, Congress made explicit its intention to adopt the rule of decision of this Court employed in cases preceding *Employment Division v. Smith,* 494 U.S. 872 (1990). The long standing rule of this Court was that questions of importance of or centrality of religiously motivated practices to faiths were beyond the competence and ken of courts. *See, e.g., Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450 (1969). Nonetheless, the court below inquired directly into the question of importance or centrality of the practice of selling t-shirts bearing religious messages to the faith of the Petitioners. In doing so, the court of appeals trenched upon this Court's direct holdings in *Smith, Hernandez, Presbyterian Church,* and other cases.

II. REVIEW IS WARRANTED SO THAT THIS COURT MAY ANSWER AN IMPORTANT FEDERAL QUESTION THAT IT HAS NOT PREVIOUSLY ADDRESSED

The decision below – legitimizing a judicial practice of winnowing religiously motivated practices to separate out those that are less important to an adherent's observation of the tenets of his faith from those that are mandatory to it when deciding claims under RFRA – presents questions of exceptional importance that warrant review and resolution by this Court. The decision below decides an important federal question while paying almost no attention to those principles that have guided this Court in its resolution of similar issues.

This Court previously reviewed the question of Congress' *authority* to impose the requirements of RFRA on the States[1] pursuant to its authority granted by section five of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). But this Court has not yet addressed the statutory construction question under RFRA raised by the decision below.

The government and the Petitioners have widely diverged on

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1. The federal government (including Respondents) and various federal courts of appeals have subsequently the position that RFRA remains valid against the *federal* government. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9th Cir. 1999); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 858-59 (8th Cir. 1998); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001). Congress obviously has the power to amend its own statutes to protect religious liberty, wholly aside from the scope of its section five power under the Fourteenth Amendment.

many issues. There is one issue, however, on which the parties have consistently expressed agreement: the scope of coverage afforded by RFRA.[2] Yet it was precisely this issue, an issue not in dispute between the parties and not contested on appeal, that the court below raised *sua sponte* at oral argument and that the court decided without briefing by the parties. In the course of doing so, the court of appeals misapprehended the scope of RFRA and incorrectly resolved the questions before it.

In reaching its conclusion, the court of appeals took note of the fact that Congress had amended RFRA on the specific question of the scope of practices protected by the statute. App. 1a-2a.[3] As amended, RFRA's scope of coverage is not limited

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2. *Compare* Brief of Defendants-Appellees at 20-21 n.9 ("The government supports the view that religious practices, even if the religion does not deem them mandatory, are eligible for RFRA protection") with Reply Brief of Plaintiffs-Appellants at 6 ("Thus, whether Henderson's and Phillips' sales of shirts with religious messages is mandated or motivated by their religion, such practices fall within the scope of RFRA and require application of the appropriate analysis under RFRA to their claims").

3. That amendment was part of Congress' enactment of the Religious Land Use and Institutionalized Persons Act of 2000, ("RLUIPA") Title 42 U.S.C. § 2000-cc *et seq.* Prior to that amendment, RFRA, which restricted the ability of federal actors to substantially burden exercises of religion, was crafted to protect "exercise(s) of religion under the First Amendment to the Constitution." Title 42 U.S.C. § 2000-bb(2). But, with the enactment of RLUIPA, Congress amended "exercise of religion" so that it now means, "'religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'" *See* Public Law 106-274, § 7(a)(3). In turn, without limitation, RLUIPA defines "religious exercise" as "includ[ing] any exercise of religion, whether

to religious practices that are "important" to or "central" to a religious faith. Instead, RFRA explicitly affords coverage to any exercise of religion "whether or not compelled by, or central to, a system of religious belief." *See* Title 42 U.S.C. § 2000bb-2(4); Public Law 106-274, § 8(7)(A), Title 42 U.S.C. § 2000-cc(5).

Despite Congress' express amendment of RFRA, the District of Columbia Circuit imported into the analysis of the Petitioners' RFRA claims consideration of importance of a practice to the claimant's religion. The court below apparently believed that the precise inquiry barred by Congress in its definition of "religious exercise" could be reintroduced under the guise of determining whether a burden is "substantial." App. 2a-3a. The appeals court's "nuanced" approach is nothing short of evasion of the statutory text.

The federal questions presented are significant. They merit careful review and considered resolution. In the period since Congress enacted RFRA, lower courts have engaged in an extensive struggle to analyze claims under the Act,[4] and legal

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or not compelled by, or central to, a system of religious belief." *See* Public Law 106-274, § 8(7)(A), Title 42 U.S.C. § 2000-cc(5).

4. By no means exhaustive, the following list of *reported* cases in which these issues confronted the lower courts is extensive: *Abordo v. Hawaii*, 938 F. Supp. 656 (D. Haw. 1996); *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995); *Best v. Kelly*, 879 F. Supp. 305 (W.D.N.Y. 1995); *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994); *Commack Self-Service Kosher Meats v. New York*, 954 F. Supp. 65 (E.D.N.Y. 1997); *Diaz v. Collins*, 872 F. Supp. 353 (E.D.

commentators have engaged in an extended discussion of the Act's validity, construction and scope.[5] Of course, that

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Tex. 1994),*Dickerson v. Stuart*, 877 F. Supp. 1556 (M.D. Fla. 1995); *Gunning v. Runyon*, 3 F. Supp. 2d 1423 (S.D. Fla. 1998); *Hall v. Griego*, 896 F. Supp. 1043 (D. Colo. 1995); *In re Three Children*, 24 F. Supp. 2d 389 (D.N.J. 1998); *Jihad v. Wright*, 929 F. Supp. 325 (N.D. Ind 1996); *Keeler v. Mayor of Cumberland*, 951 F. Supp. 83 (D. Md. 1997); *Luckette v. Lewis*, 883 F. Supp. 471 (D. Ariz. 1995); *Packard v. United States*, 7 F. Supp. 2d 143 (D. Conn. 1998); *Storm v. Town of Woodstock*, 944 F. Supp. 139 (N.D.N.Y. 1996); *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-1*, 942 F. Supp. 511 (W.D. Okla. 1996); *Turner-Bey v. Lee*, 935 F. Supp. 702 (D. Md. 1996); *United States v. Marks*, 947 F. Supp. 858 (E.D. Pa. 1996); *United States v. Ramon*, 86 F. Supp. 2d 665 (W.D. Tex. 2000); *United States v. Sandia*, 6 F. Supp. 2d 1278 (D. N.M. 1997); *Utah v. Evans*, 143 F. Supp. 2d 1290 (D. Utah 2001); *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994); *Woods v. Evatt*, 876 F. Supp. 756 (D.S.C. 1995).

5. By no means exhaustive, the list of articles and notes addressing these questions is extensive: *See, e.g.*, Blatnik, *No RFRAF Allowed: the Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 Colum. L. Rev. 1410 (Oct. 1998); Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in City of Boerne v. Flores*, 31 Creighton L. Rev. 693 (May 1998); Buss, *Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 Iowa L. Rev. 391 (Jan. 1998); Smolin, *The Free Exercise Clause, the Religious Freedom Restoration Act, and the Right to Active and Passive Euthanasia*, 10 Issues L & Med 3 (Summer 1994); Williamson, *City of Boerne v Flores and the Religious Freedom Restoration Act; The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J Land Use & Envt'l L. 107 (Fall 1997); Brant, *Taking the Supreme Court at its Own Word:*

extensive course of judicial contention even reached this Court when it decided the question of Congress' authority to impose the requirements of RFRA on States in *City of Boerne v. Flores*, 521 U.S. 507 (1997). And, while that decision invalidated RFRA as applied to State and local governmental burdens on religious freedom, courts are still confronting the issues of the constitutionality, scope and construction of the statute.[6]

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the Implications for RFRA and Separation of Powers, 56 Mont L. Rev.5 (Winter 1995); Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont L. Rev.39 (Winter 1995); Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont L. Rev.145 (Winter 1995); Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont L. Rev.171 (Winter 1995); Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 Mont L. Rev.227 (Winter 1995); Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont L. Rev.249 (Winter 1995); Jamar, *This Article Has No Footnotes: an Essay on Rfra and the Limits of Logic in the Law*, 27 Stetson L. Rev.559 (Fall 1997).

6. After this Court's decision in *City of Boerne*, the lower courts have continued to confront many of these same questions. One key question over which lower federal courts have diverged is whether RFRA's application to federal law was severable from the portion of the statute struck down in *City of Boerne*, and survived the decision in that case. *See* n.1, *supra* (citing cases); *Caldwell v. Caesar*, 150 F. Supp. 2d 50, 55-56 (D.D.C. 2001) (discussing cases). The lower courts that have considered this question have reached different conclusions. *Compare, e.g., Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998) ("under the Bankruptcy Clause and the Necessary and Proper Clause of Article I of the Constitution,

During the pendency of the appeal below, Congress enacted and President Clinton signed into law the Religious Land Use and Institutionalized Persons Act of 2000, Public Law 106-274 (codified at Title 42 U.S.C. § 2000cc, *et seq.*) ("RLUIPA"), that authorizes a cause of action in certain circumstances of governmental interference with land usage by religious groups and organizations and religious practices of prisoners. In RLUIPA, Congress explicitly imposed the same standard for deciding whether a religious practice has been "substantially burdened" under RFRA as governs claims under RLUIPA. Consequently, the danger is real that the lower court's erroneous and counter-textual construction of the "substantial burden" provision of RFRA will infect both RFRA and RLUIPA cases in the lower courts.

For this reason, the Court should grant the Petition to address and resolve the important federal questions presented.

RFRA is constitutional as applied to federal law") *with United States v. Sandia*, 6 F. Supp. 2d 1278, 1281-82 (D.N.M. 1997) ("In light of these passages from City of Boerne the Court disagrees with the United States' and Mr. Sandia's assertion that RFRA is not wholly unconstitutional and has continued vitality when applied to the federal government"). In the instant case, the court of appeals initially expressed doubt about the continued vitality of RFRA after *City of Boerne*, App. 8a-9a, but in the opinion accompanying the Order denying rehearing, the court expressed the view that, given the amendment of RFRA by Congress in RLUIPA, its reserved doubts were assuaged, App. 2a.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF TWO FEDERAL COURTS OF APPEALS

In analyzing claims under the Religious Freedom Restoration Act, the United States Court of Appeals for the District of Columbia considered the "importance" of a religiously motivated practice to the faith of the adherent. App. 2a,-3a, 9a-10a. That approach is starkly in contrast with the practice of the United States Courts of Appeals for the Second and Seventh Circuits. At the same time, the decision below comports with the approach to analyzing claimed "substantial burdens" by the United States Courts of Appeal for the Fourth, Ninth, and Eleventh Circuits. This Court should grant the petition in order to resolve that conflict among these six federal circuits.

Circuit Courts Concluding That Judicial Inquiries Into Importance or Substantiality of a Threatened Practice are Outside the Scope of RFRA:

♦ **The United States Court of Appeals for the Second Circuit:** In *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996), a prisoner's rights lawsuit, a Rastafarian was kept in medical lock-down for three years because he refused to allow prison officials to administer a latent tuberculosis test. 76 F.3d at 471-72. He declined that procedure because, as he practiced it, Rastafarianism prohibited him from allowing unnatural things to enter his body. The district court had ruled in favor of the RFRA claimant, and the Second Circuit affirmed. 76 F.3d at 473.

In analyzing the RFRA claim, the *Jolly* court first considered

whether the prisoner had alleged that a religious practice had been substantially burdened. 76 F.3d at 476. In deciding that question, the second circuit held, "[o]ur scrutiny extends *only* to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Id.* (emphasis added; citing case) . Anything more than such a very limited examination of a religious practice and its relationship to an adherent's faith, the court reasoned, "would be inconsistent with our nation's fundamental commitment to individual religious freedom . . . ." *Id.* Under the Second Circuit's approach, the inquiry into importance or centrality of a burdened religious practice is plainly prohibited.

♦ **The United States Court of Appeals for the Seventh Circuit**: In *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated and remanded on other grounds sub nom. O'Leary v. Mack*, 522 U.S. 801 (1997), the United States Court of Appeals for the Seventh Circuit reversed a district court judgment in another prisoner's rights case. The prisoner asserted, during Ramadan, an Islamic holy season, that the prison refused to make certain requested accommodations, and, consequently violated his rights under RFRA. 80 F.3d at 1177-78. To decide whether the prison had substantially burdened the prisoner's religious practice, the Seventh Circuit announced that it would assess the "substantial burden" using three alternative considerations:

> We hold, therefore, that a substantial burden on the free exercise of religion, within the meaning of the Act, *is one that forces adherents of a religion to refrain from religiously motivated conduct*, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or

expression that is contrary to those beliefs.

Mack, 80 F.3d at 1179. In doing so, the Seventh Circuit took note of the fact that the approach it took provided a broader and more generous construction of RFRA than in certain other circuits. 80 F.3d at 1178 (citing cases). As the *Mack* court explained, "the decisive argument in favor of the generous definition of 'substantial burden,' it seems to us, is the undesirability of making judges arbiters of religious law, . . . as required" under the approach of those courts that have adopted the "importance" or "centrality" approach. *Id.* (citations omitted).

Circuit Courts Concluding That Judicial Inquiries Into Importance or Substantiality of a Threatened Practice are Appropriate When Analyzing RFRA Claims:

♦ **The United States Court of Appeals for the Fourth Circuit**: In *Goodall by Goodall v. Stafford County School Board*, 60 F.3d 168, 172-73 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit rejected a RFRA challenge to the denial of educational funding assistance for a hearing-impaired child. The court held that the RFRA claim failed because the claimants were not "compelled to engage in conduct proscribed by their religious beliefs, nor . . . forced to abstain from any action which their religion mandates that they take."

♦ **The United States Court of Appeals for the Ninth Circuit**: *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (*per curiam*) the United States Court of Appeals for the Ninth Circuit rejected a RFRA claim in a prisoner's rights suit brought by an adherent of Pentacostalism. The court held that the RFRA claim failed because the claimant omitted proof of

"any facts to show that the activities which he wishes to engage in are mandated by the Pentecostal religion." 46 F.3d at 948.

♦ **The United States Court of Appeals for the Eleventh Circuit**: In *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995), the United States Court of Appeals for the Eleventh Circuit rejected a RFRA challenge to the application of a federal clinic access statute, Title 18 U.S.C. § 248. The court found RFRA inapplicable because the claimants did "not assert that the exercise of their religion requires them to use physical force or threats of physical force to prevent abortions."

♦ **The United States Court of Appeals for the District of Columbia Circuit**: In the instant case, the initial decision of the court of appeals denied Petitioners' RFRA claim on the ground that the sale of t-shirts bearing religious messages was not central to their faith. App. 9a-10a (citations and internal quotation marks omitted). Then, when confronted with the amendment by Congress of RFRA, an amendment specifically addressing the meaning of the disputed term, "substantially burden" the court below reasserted its capacity to answer questions of importance and centrality in determining the extent to which a restriction on a practice constitutes a substantial burden. App. 2a-3a.

This Court should grant the Petition in order to address the conflict among the circuit courts regarding the meaning of the term, "substantially burden" as used in RFRA.

IV. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT

The decision below conflicts with several decisions of this Court on the judicial practice of inquiring into importance or

centrality of burdened practices to religious beliefs. *See Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715-16 (1981); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 450 (1969); *United States v. Seeger*, 380 U.S. 163, 185 (1965).

As previously noted, in enacting RLUIPA Congress amended RFRA to eliminate the use of an "importance" or "centrality" test in cases asserting violations of RFRA. The change in RFRA mirrored a series of decisions of this Court in cases asserting violations of the Free Exercise Clause. Despite the holding below to the contrary, the settled law governing the Free Exercise Clause clearly disallows any judicial enterprise of measuring and deciding questions of "centrality." The decision below, however, made no reference to that pole star of Free Exercise Clause analysis. When the court of appeals' attention was brought to the amendment of RFRA in the petition for rehearing, the court offered no justification for its failure to bring the judgment below into compliance with the terms of amended RFRA.

In *Employment Div. v. Smith*, 494 U.S. 872 (1990), this Court noted its own prior abandonment of the "centrality" inquiry. For the majority, Justice Scalia wrote, it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 494 U.S. at 887 (internal quotation marks and citation omitted). That incompetence of inquiry, the majority explained, had led this Court, "[r]epeatedly and in many different contexts, [to] warn[] that

courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Id.*

The majority, moreover, was not alone in the expression of the view that "centrality" was an inquiry beyond the competence of the judiciary. Justice O'Connor stated, "I agree with the Court . . . [that] 'it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.'" 494 U.S at 906 (O'Connor, J., concurring) (*quoting Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). In dissent, Justice Blackmun agreed "that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion." 490 U.S. at 919 (Blackmun, J., dissenting).

The agreed view of this Court, then, left no place in the analysis of Free Exercise Clause claims for judicial determinations of "centrality." Moreover, *Employment Division* was not an innovation. Prior decisions of the Supreme Court either directly held that "centrality" was outside of the judicial competence or suggested as much.

In *Hernandez v. Commissioner*, 490 U.S. 680 (1989), this Court held, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 490 U.S. at 699.

Several years earlier, this Court decided *Thomas v. Review Bd.*, 450 U.S. 707 (1981). *Thomas* involved a circumstance in which the views held by a particular adherent of a sect diverged in certain respects from that of his faith group. There, this Court concluded that it was the religious belief of the particular *adherent*, not of the *group*, that was determinative. Explaining,

this Court held, "[t]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . It is not within the judicial function and judicial competence to inquire [who has] more correctly perceived the commands of their common faith." 450 U.S. at 715-16. Again, this Court denied the judicial competence to engage in an assay of centrality of practices to religion.

In 1969, in *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969), this Court rejected the approach taken by Georgia courts to the resolution of disputes over the right to control and dispose of properties pertaining to a hierarchical denomination. As this Court explained:

> The [test] which [the Georgia courts] applied requires the civil judiciary to determine whether actions of the general church constitute such a "substantial departure" from the tenets of faith .... This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. . . . [I]t must then go on to determine *whether the issue on which the general church has departed holds a place of... importance in the traditional theology* .... A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. Thus, the . . . Georgia . . . theory requires the civil court to determine matters at the very core of a religion -- the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the

> First Amendment forbids civil courts from playing such a role.

393 U.S. at 449-50 (emphasis added). Yet it was precisely this exercise, interpreting Henderson's doctrine and deciding how near to the core or how far out to the periphery his religious practice of selling t-shirts bearing religious message was, that the panel undertook. And it was no more correct in doing so than the Georgia courts were in *Mary Elizabeth Blue Hull Mem. Presbyterian Church.*

That approach, moreover, was consistent with this Court's earlier decisions in deciding conscientious objectors' cases. For example, in *United States v. Seeger*, 380 U.S. 163 (1965), while discussing one conscientious objector's opposition to war-making, this Court noted:

> Religious experiences which are as real as life to some may be incomprehensible to others. . . . [A court's] task is to decide whether the beliefs professed by [an individual] are sincerely held and whether they are, in his own scheme of things, religious.

380 U.S. at 184-85 (quotation omitted). Moreover, in *United States v. Ballard*, 322 U.S. 78 (1944), this Court held that it was repugnant to the First Amendment to submit to a jury the question of the verity of a defendant's religious beliefs. The incompetence of the jury to decide such a question, just like the incompetence of courts to that task, resulted from the genius of the Founders:

> The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views. *Man's relation to his God was made no concern of the state.* He was granted

> the right to worship as he pleased and to answer to no man for the verity of his religious views. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

322 U.S. at 87-88 (citations, internal quotation marks omitted).

Obviously, then, *Employment Div.* simply recognized what was already established – judicial incompetence to decide importance or centrality of a threatened practice – at least by the time of the decision in *Hernandez*. By its decisions, this Court has demonstrated that the inquiry undertaken below, into the importance or centrality of a particular religiously motivated practice to the faith of the Petitioners, was beyond the competence of the courts. Heedless of this Court's teaching, however, the court below engaged in precisely that assaying of the value to Henderson and Phillips of the sale of t-shirts bearing religious messages to their faith. This Court should review the judgment of the court below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

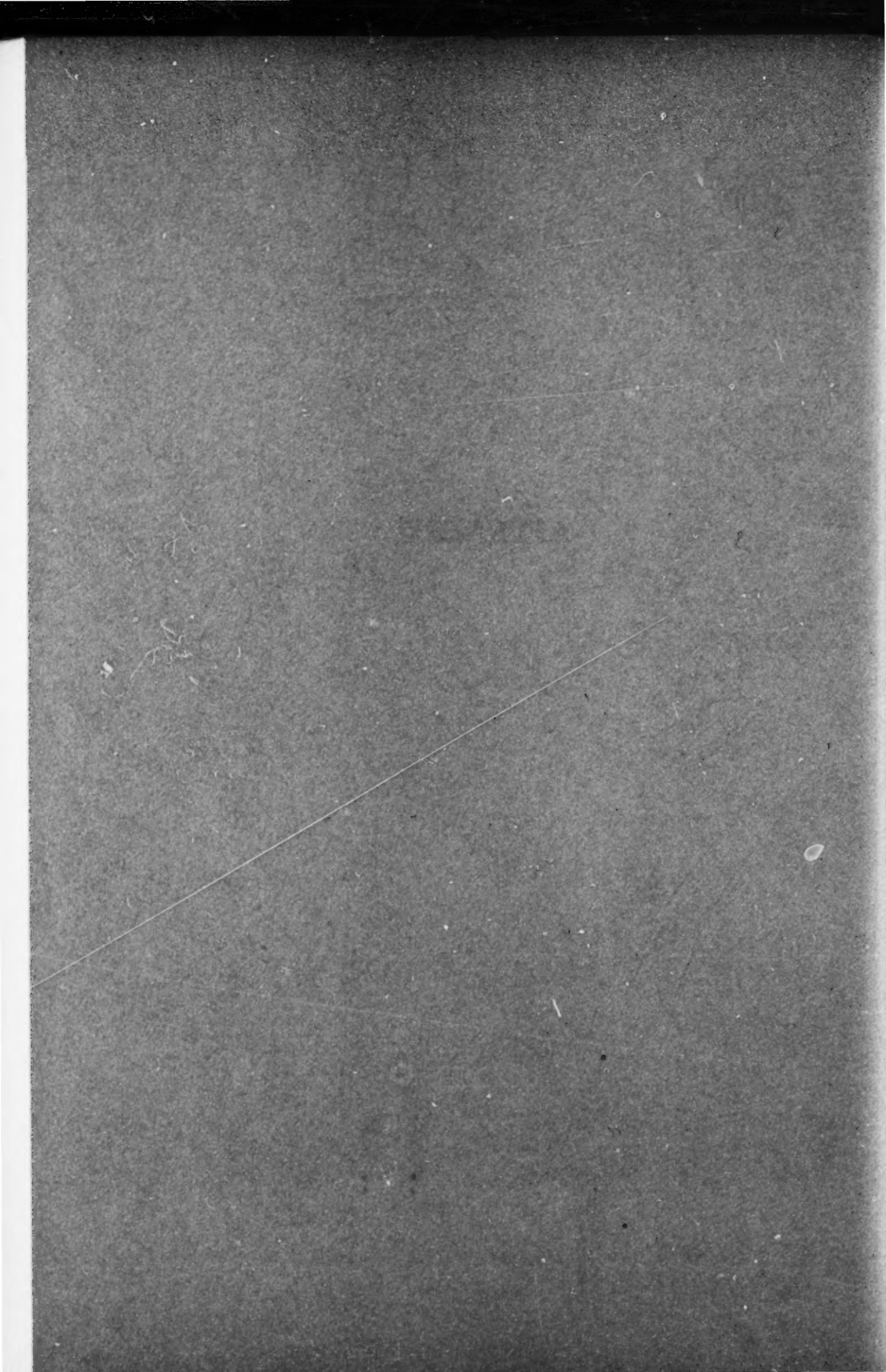
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APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 2, 2001
No. 00-5070

AUGUSTINE DAVID HENDERSON,
APPELLANT

v.

ROGER A. KENNEDY, ET AL.,
APPELLEES

Consolidated with
No. 00-5071

On Appellant's Petition for Rehearing

Before: Henderson, Randolph, and Garland, Circuit Judges

Opinion for the Court filed by Circuit Judge Randolph.

RANDOLPH, *Circuit Judge*: The petition for rehearing directs us to amendments of the Religious Freedom Restoration Act (RFRA), *42 U.S.C. § 2000bb et seq.*, enacted a year ago, but not mentioned by either side when the case was last before us. The petition argues that the amendments render erroneous our decision sustaining, as against a claim under RFRA, the National Park Service's regulation prohibiting the sale of t-shirts on the National Mall.

RFRA had defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." *42 U.S.C. § 2000bb-2*(4) (1999). The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274,

§ § 7-8, 114 Stat. 803, 806 (2000), altered the definition to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief. " *42 U.S.C. § 2000cc-5*(7)(A), *incorporated by 42 U.S.C. § 2000bb-2*(4).

The amendments remove the doubt expressed in our opinion, *see Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001),* that the portion of RFRA remaining after *City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)*--the portion, that is, applicable to the federal government (and not enacted pursuant to § 5 of the Fourteenth Amendment)--survived the Supreme Court's decision striking down the statute as applied to the States.

The amendments did not alter RFRA's basic prohibition that the "government shall not substantially burden a person's exercise of religion." *42 U.S.C. § 2000bb-1*(a). *See also Henderson, 253 F.3d at 15; Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001); Murphy v. Zoning Comm'n of the Town of New Milford, 148 F. Supp. 2d 173, 188 (D. Conn. 2001).* Our opinion assumed that plaintiffs Henderson and Phillips wanted to sell t-shirts on the Mall because of their religious beliefs. Our focus was on whether the Park Service regulation imposed a "substantial burden" on their exercise of religion. *See Henderson, 253 F.3d at 16-17.* In reaching our judgment we examined the importance of selling t-shirts on the Mall to the plaintiffs. Our conclusion was this: "Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means [by which petitioners may engage in their vocation to spread the gospel], it is not a substantial burden on their vocation. Plaintiffs can still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall." *Id. at 17.* That conclusion is unaffected by the amendments of RFRA. Although the amendments extended the protections of RFRA to

"any exercise of religion, whether or not compelled by, or central to, a system of religious belief," *42 U.S.C. § 2000cc-5*(7)(A), *incorporated by 42 U.S.C. § 2000bb-2*(4), the amendments did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists. The petition for rehearing is therefore denied.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

February 13, 2001, Argued
June 26, 2001, Decided

No. 00-5070

AUGUSTINE DAVID HENDERSON,
APPELLANT

V.

ROGER A. KENNEDY, ET AL.,
APPELLEES

Consolidated with
No. 00-5071

Before: Henderson, Randolph, and Garland, Circuit Judges

Opinion for the Court filed by Circuit Judge Randolph.

RANDOLPH, *Circuit Judge*:

Plaintiffs Henderson and Phillips allege that they are evangelical Christians. They want to sell t-shirts on the National Mall--a practice presently prohibited by a regulation of the National Park Service. Initially they claimed that the Free Speech Clause of the First Amendment guaranteed them this right. When we ruled against that claim in another case, they amended their complaints to add, among other claims, causes of action based on the Religious Freedom Restoration Act and the Equal Protection component of the Due Process Clause. For the reasons that follow, we affirm the district court's grant of summary judgment in favor of the government.

I.

The Park Service's regulation, promulgated in 1995, flatly prohibits the sale of goods in designated sections of the National Mall such as the areas immediately surrounding the Lincoln Memorial and the Washington Monument. *36 C.F.R. § 7.96(k)(2)*. In other Mall areas, during "special events or demonstrations," the sale of "books, newspapers, leaflets, pamphlets, buttons and bumper stickers" is permitted. *Id.* Before this regulation, t-shirts could be sold in conjunction with demonstrations or special events. But "excessive commercialism" had "degraded aesthetic values" and converted much of the Mall area into a "flea market." National Capital Region Parks; Sales, *59 Fed. Reg. 25,855, 25,857* (May 18, 1994). The Park Service therefore decided to ban certain commercial transactions from the Mall, including the sale of t-shirts. National Capital Region Parks; Special Regulations, *60 Fed. Reg. 17,639* (Apr. 8, 1995).

Lawsuits challenging the regulation included one brought by seven non-profit organizations that had been selling t-shirts on the Mall, and separate pro se complaints by Henderson and Phillips. *See Friends of the Vietnam Veterans Memorial v. Kennedy, 899 F. Supp. 680 (D.D.C. 1995)* ("*Friends I*"), *rev'd, 325 U.S. App. D.C. 151, 116 F.3d 495 (D.C. Cir. 1997)* ("*Friends II*"), *on remand, 984 F. Supp. 18 (D.D.C. 1997)* ("*Friends III*"), *rev'd sub nom. Henderson v. Stanton, 335 U.S. App. D.C. 318, 172 F.3d 919 (table), 1998 WL 886989 (D.C. Cir. 1998)* (unpublished opinion) ("*Henderson III*"); *Henderson III, on remand, 76 F. Supp. 2d 10 (D.D.C. 1999)* ("*Henderson IV*").[1] The suits alleged that the ban on the sale of t-shirts

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1. *Henderson I, Henderson v. Lujan, 768 F. Supp. 1 (D.D.C. 1991),* and *Henderson II, Henderson v. Lujan, 296 U.S. App. D.C. 58, 964*

abridged the freedom of speech in violation of the First Amendment.

The International Society of Krishna Consciousness (ISKCON) also brought an action claiming, among other things, that an earlier Park Service regulation violated the First Amendment to the extent that it prohibited the sale of audio tapes and religious beads on the Mall. Our decision, rendered in August 1995, sustained the regulation's ban on the sale of beads and audio tapes. *ISKCON of Potomac, Inc. v. Kennedy, 314 U.S. App. D.C. 63, 61 F.3d 949 (D.C. Cir. 1995).* Nonetheless, the district court later granted summary judgment in favor of the non-profit organizations. *Friends I, 899 F. Supp. at 688.* The district court reasoned that message-bearing t-shirts were "a unique and especially effective means" of communicating a viewpoint, *id. at 684,* and that the Park Service's allowing other forms of commercial activity on the Mall undercut the rationale of its ban. *Id. at 686.* We reversed, holding that the case was controlled by *ISKCON*, and that the regulation did not violate the First Amendment. *Friends II, 325 U.S. App. D.C. 151, 116 F.3d 495.*

After *Friends II*, counsel for Henderson and Phillips entered an appearance, and moved for leave to file an amended complaint, seeking to add equal protection claims and claims under the Religious Freedom Restoration Act (RFRA) and the Administrative Procedure Act. *Friends III, 984 F. Supp. at 20.* The district court initially granted leave to amend, but reconsidered, and denied leave on the ground that the amendments would be futile in light of *Friends II. Id.* In *Henderson III,* an unpublished opinion, we reversed because the

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F.2d 1179 (D.C. Cir. 1992), challenged different provisions of an earlier version of the same regulation, and are not relevant here.

court had not explained its holding. *172 F.3d 919* (table).

Henderson and Phillips then amended their complaints to add the new causes of action and to allege that they "hold[ ] the sincere religious belief that [they are] obliged by the Great Commission to preach the good news, the gospel, of salvation through Jesus Christ to the whole world." The amended complaints also alleged that they have "a religious vocation to communicate by all available means the message of the Gospel." As part of their religious "outreaches" on the National Mall, both had sold t-shirts in the past, and both want to continue doing so. To that end, they sought declaratory and injunctive relief. The government moved to dismiss or, in the alternative, for summary judgment. Both sides submitted declarations in support of their pleadings. The district court, apparently treating the government's motion as one for summary judgment, granted it. *Henderson IV, 76 F. Supp. 2d at 16.*

II.

A.

We begin with plaintiffs' claims that the regulation's ban on selling t-shirts on the Mall violates their rights under the Religious Freedom Restoration Act (RFRA), *42 U.S.C. § 2000bb et seq.* Congress enacted RFRA in response to *Employment Division v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).* The *Smith* Court held that the Free Exercise Clause of the First Amendment--"Congress shall make no law ... prohibiting the free exercise" of religion--did not exempt individuals from complying with "neutral, generally applicable" laws, even if the laws substantially burdened religious exercise. *494 U.S. at 881.* In RFRA Congress sought to overturn the *Smith* decision by restoring the test set forth in *Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct.*

1790 (1963), as the standard for Free Exercise challenges to laws of general applicability. *See City of Boerne v. Flores, 521 U.S. 507, 512-13, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997);* Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 157 (1997).* Under *Sherbert*, the question had been whether the law "substantially burdened" a religious practice and, if so, whether the burden was justified by a compelling governmental interest. *See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972).* RFRA incorporated the "substantial burden" standard. It prohibited any "branch, department, agency, instrumentality, [or] official" of a state or federal government or "other persons acting under color of law" from "substantially burdening a person's exercise of religion" unless the government demonstrated that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that ... interest." *42 U.S.C. § 2000bb-1. Branch Ministries v. Rossotti, 341 U.S. App. D.C. 166, 211 F.3d 137, 144 (D.C. Cir. 2000).*

City of Boerne struck down the portion of RFRA regulating state and local governments because Congress had exceeded its power under § 5 of the Fourteenth Amendment. *521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624.* RFRA was not "remedial, preventive legislation." *Id. at 532.* It did not enforce the Free Exercise Clause. *Id. at 519, 532.* Instead Congress had attempted to alter the Supreme Court's interpretation of that constitutional provision.

An initial question in light of *City of Boerne* is whether the remainder of RFRA--the portion applicable to the federal government (and not enacted pursuant to the § 5 of the Fourteenth Amendment)--survives the Court's decision. If severance of the invalid part of a statute results in legislation that

it is evident Congress would not have enacted, then the entire statute should be considered invalid. *See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-86, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987); United States v. Raines, 362 U.S. 17, 23, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960).* We mentioned this issue at oral argument, but the government failed to argue the point in its brief. And so we will leave to another day the question whether RFRA is severable, as the Eighth and Tenth Circuits believe. *See Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001); In re Young, 141 F.3d 854, 858-59 (8th Cir. 1998).*

As to the validity of the regulation under RFRA, we start with the proposition that the regulation is neutral; it is generally applicable and it does not discriminate among viewpoints. Our decision in *ISKCON* settled as much. *61 F.3d at 957-58.* Under RFRA, then, the question is: does the ban on selling t-shirts on the Mall "substantially burden" plaintiffs' exercise of their religion? The answer is clearly no. We are not aware of any religious group that has as one of its tenets selling t-shirts on the National Mall, even if the t-shirts bear a religious message. Plaintiffs do not claim to belong to any such group, nor do they allege that selling t-shirts in that particular area of the District of Columbia is central to the exercise of their religion. In their identical declarations, submitted in opposition to summary judgment, Henderson and Phillips stated only that they "hold the sincere religious belief that [they] are obligated by the Great Commission to preach the good news, the gospel, of salvation through Jesus Christ to the whole world ... by all available means...." With respect to t-shirts, they stated that in "obedience to [their] vocation, [they] have distributed at a price publications and t-shirts that [they have] written or designed, or containing content that conforms with [their] beliefs, because the preparation of these materials requires money; [their] vocation includes the distribution of such materials for an amount that

covers the cost to create them and to enable [them] to carry out [their] vocation."

Given these representations, plaintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires. *See Goodall by Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172-73 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995)* (per curiam). Their declarations do not suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate. There is no indication that they have followed--or attempted to follow--any such practice. If they had, there is no doubt that they would have come in conflict with a host of federal, state and local restrictions on commercial activities in many areas, including for instance the interiors of government buildings open to the public. Nor does the regulation "significantly inhibit or constrain conduct or expression that manifests some central tenet of [Henderson's or Phillips's] individual beliefs." *Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir.* 1995). Plaintiffs have not treated selling t-shirts on the Mall as rising to that level of significance in their religion. Further, plaintiffs have merely alleged that it is their vocation to spread the gospel by "all available means." Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means, it is not a substantial burden on their vocation. Plaintiffs can still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall. *See Weir v. Nix, 114 F.3d 817 (8th Cir. 1997)* (considering alternatives in determining whether burden was "substantial"); *Bryant, 46 F.3d 948* (no "substantial burden" where alternatives were available).

We acknowledge that the Seventh Circuit, in a pre-*Boerne*

state prison case arising under RFRA, listed among the tests for determining whether there is a substantial burden on the exercise of religion the question whether the governmental restriction forced "adherents of a religion to refrain from religiously motivated conduct," *Mack v. O'Leary, 80 F.3d 1175, 1178 (7th Cir. 1996) (citing Brown-El v. Harris, 26 F.3d 68, 70 (8th Cir. 1994)).*[2] We are not applying that standard for several reasons. First, plaintiffs did not advocate it. Second, our opinion in *Branch Ministries* relied on a narrower test. *211 F.3d at 142.* To our court, "substantial burden" in RFRA is what the Supreme Court had in mind in its pre-*Smith* opinion in *Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384-85, 107 L. Ed. 2d 796, 110 S. Ct. 688 (1990):* the proper free exercise inquiry was whether "the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." The idea that a restriction on religiously motivated conduct requires a compelling governmental interest is inconsistent with the formulation just quoted. One can conceive of many activities that are not central or even important to a religion, but nevertheless might be religiously motivated. In fact it is hard to think of any conduct that could not potentially qualify as religiously motivated by someone's lights. To make

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2. The full text of the court's holding is as follows:

> We hold, therefore, that a substantial burden on the free exercise of religion, within the meaning of the Act, is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.

Mack, 80 F.3d at 1179.

religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement. Despite the language we have quoted from the *Mack* opinion, *see supra* note 2, we do not think this is what the Seventh Circuit intended. Later in its opinion, the court of appeals indicated that under its test courts must "separate center from periphery in religious observances," that only practices that are "important" (if not central) to the religion qualify, and that the "proper and feasible question for the court is simply whether the practices in question are important to the votaries of the religion...." *80 F.3d at 1179-80.*

B.

Plaintiffs also mount an equal protection attack on the t-shirt sales ban. They argue that the Park Service has not applied its regulations equally because there have been demonstrations in which--they allege--t-shirts were sold on the Mall without the Park Service taking action against the vendors. The contention is, in essence, one of selective enforcement, a claim plaintiffs have not come close to making out.

The Park Service submitted the declaration of Richard Merryman, Chief of the Division of Park Programs, National Capital Parks-Central, who explained that the Service "seeks to monitor the activities of permittees on parkland to ensure permit and regulatory compliance.... Whenever violations are discovered ... action is taken to ensure compliance with permits and regulations." Plaintiffs presented nothing in rebuttal. Even if there had been lapses in enforcement, there was no indication that these were attributable to impermissible discrimination. Plaintiffs, in short, failed to adduce admissible evidence showing inconsistent treatment based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *United States*

v. Armstrong, 517 U.S. 456, 464, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996) (citing *Oyler v. Boles, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962)); see also Sanjour v. EPA, 312 U.S. App. D.C. 121, 56 F.3d 85, 92 n.9 (D.C. Cir. 1995); United States v. Grace, 250 U.S. App. D.C. 197, 778 F.2d 818, 822 n.7 (D.C. Cir. 1985).*

Plaintiffs also allege an equal protection violation because the Park Service permits Guest Services, Inc., a concessionaire, to operate a number of facilities on the Mall in which it sells various items, including food and t-shirts. In *Friends II* we rejected an argument, based on these kiosk sales, that "in areas where the Park Service already allows a certain degree of commercialism," the First Amendment's Free Speech Clause requires that it also allow t-shirt sales. *116 F.3d at 498.* So here. Plaintiffs have not shown that they are "similarly situated" to the commercial vendor. *See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1984); Women Prisoners of D.C. Dep't of Corrections v. District of Columbia, 320 U.S. App. D.C. 247, 93 F.3d 910, 924 (D.C. Cir. 1996).* The concessions at issue are expressly authorized by statute, *16 U.S.C. § § 5951-5966*, they are carefully regulated to ensure that they do not have a negative impact on the Mall, and they are "limited only to those facilities and services necessary and appropriate for the convenience of the public." *60 Fed. Reg. at 17,647.* So far as the record reveals, plaintiffs have not applied to become concessionaires and they have not sought to meet any of the regulatory requirements governing concessionaires. *Id.*

In essence, plaintiffs ask us to hold that equal protection requires the Park Service to ban t-shirt sales by all possible vendors, or by none. However, "it is not a requirement of equal protection that all evils of the same genus be eradicated or none

at all." *Railway Express Agency v. New York, 336 U.S. 106, 110, 93 L. Ed. 533, 69 S. Ct. 463 (1949).* Congress has decided that some concessions may be appropriate to serve park visitors, and the Park Service has adopted a reasonable scheme to accomplish that end while preserving the aesthetic integrity of the National Mall. The classification of which plaintiffs complain "does not contain the kind of discrimination against which the Equal Protection Clause affords protection." *Id.* The district court rightly held that they had not made out a colorable equal protection claim.

C.

Plaintiffs also attempted to raise several First Amendment claims. We say "attempted" because it is not clear to us what arguments plaintiffs were trying to convey. For a few pages of their brief they characterized themselves as members of the press entitled to the protection of the freedom of the press guarantee in the First Amendment. The argument, to the extent it may be considered as such, goes nowhere. The Washington Post is no more entitled to sell t-shirts on the Mall than anyone else. In *Friends II* and *ISKCON*, we applied time, place and manner analysis to determine that the Park Service's regulation was valid under the First Amendment because it was content neutral, narrowly tailored to achieve a significant government interest, and left open ample alternative channels of communication. *Friends II, 116 F.3d at 497; ISKCON, 61 F.3d at 958.* Those decisions are controlling here, regardless of the identity of the prospective t-shirt sellers.

We also reject plaintiffs' contention that the regulation should receive some heightened scrutiny because they are presenting some sort of "hybrid claim" resting on both the Free Exercise Clause and the Free Speech Clause of the First Amendment. For this argument to prevail, one would have to conclude that

although the regulation does not violate the Free Exercise Clause, *see Employment Division, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595,* and although they have no viable First Amendment claim against the regulation, *see Friends II, 116 F.3d at 498,* the combination of two untenable claims equals a tenable one. But in law as in mathematics zero plus zero equals zero. Plaintiffs appear to recognize as much in their reply brief, where they admit that their "hybrid claim" "depends for its success on [plaintiffs] succeeding with either their free speech or free press claims." At any rate, we have already rejected the sort of "hybrid claim" they are making here. *See ISKCON, 61 F.3d at 958.*

Plaintiffs' remaining arguments have insufficient merit to warrant discussion. We have considered and rejected each of them. Accordingly, the judgment of the district court is

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE VIETNAM VETERANS MEMORIAL, et al.,
Plaintiffs,
v.
ROGER V. KENNEDY, et al.,
Defendants.
Civil Action Nos. 95-808; 95-850; 95-1081; 95-1240; 95-1241 (SS)
October 28, 1997, Decided
October 29, 1997, Filed

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss and Defendants' Motion for Reconsideration of Order Granting Motion for Leave to Amend and Supplement Complaint. Plaintiffs are several nonprofit groups selling message-bearing T-shirts on the National Mall. For some time they have been contesting a National Park Service Regulation banning the sale of T-shirts on the National Mall. On September 12, 1995, the Court enjoined the enforcement of the regulation because this Court found that it violated the First Amendment of the Constitution. The Court of Appeals reversed. In light of the decision of the Court of Appeals, the Court finds itself unable to afford Plaintiffs the relief they seek.

I. BACKGROUND

For many years, numerous groups and individuals have been selling message-bearing T-shirts on the National Mall. The

National Mall is a strip of national parkland situated in the center of Washington, D.C. It has been the site of some of this nation's most famous political demonstrations and speeches, including Martin Luther King, Jr.'s "I Have a Dream" speech, the Million Man March, and most recently, the Promise Keepers Assemblage. The T-shirts contain various political and religious messages, including statements to raise public awareness of POW/MIAs from the Vietnam War, protests against global warming and ozone-depletion, advocacy for statehood for Washington, D.C., arguments in support of prayer in schools, as well as numerous other slogans and messages.

In 1995, the National Park Service, in order to reduce "discordant and excessive commercialism, as well as degraded aesthetic values," decided to ban the sale of T-shirts on the Mall and in other parks in the National Capital. *59 Fed. Reg. at 25,857 (1994).* According to the National Park Service:

> After careful consideration, the NPS has concluded that the basic problem of commercialization and attendant adverse impacts on park values is caused by T-shirt sales. It has also concluded that the problem cannot be abated by other than a ban on such sales on park land.

National Capital Regions Parks; Special Regulations, 60 Fed. Reg. at 17642 (1995).

The National Park Service regulation provided in pertinent part:

> No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons, and bumper stickers.

36 C.F.R. § 7.96(k)(2).

In response to the regulation, a number of groups that sold

message-bearing T-shirts on the Mall sued to enjoin the regulation as violating their First Amendment rights. On September 12, 1995, this Court enjoined enforcement of the regulation. See *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (1995). The Court analyzed the case with the test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989). Under that test, restrictions on expression in a public forum are valid only if they are: (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information. See *id.* at 791, 109 S. Ct. at 2753.

The Court found that the absolute ban on the sale of T-shirts was invalid under the Rock Against Racism test on two grounds. First, the Court found that the ban did not leave open ample alternative means of communication because the T-shirts are "a unique and especially effective means of communicating the plaintiffs' point of view" and because the "sale of the T-shirt is the primary source of funds that enable these groups to continue to engage in their First Amendment activities." *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680, 684 (1995). Second, the Court found that the ban was not narrowly tailored to the government's interest in reducing commercialism because the Park Service allowed numerous "food vendors to roam the Mall selling ice cream and other food items" and could permit the sale of T-shirts in the areas where these food vendors were located. *Id.* at 686. The Court found that there were numerous ways for the Park Service to restrict the T-shirt vendors to particular areas of the Mall rather than completely banning the activity.

The Court of Appeals reversed. Plaintiffs Henderson and Phillips subsequently moved for leave to file an amended

complaint, which raised several new claims, including claims under the Equal Protection Clause, the Religious Freedom Restoration Act, and the Administrative Procedure Act. The Court granted the Plaintiffs' motion for leave to file. Defendants have asked the Court to reconsider. Defendants have also moved to dismiss the cases of all Plaintiffs in light of the opinion of the Court of Appeals.

II. ANALYSIS AND DISCUSSION

The Court of Appeals' decision leaves this Court with little discretion other than to grant Defendants' motions. The Court finds that in light of the Court of Appeals' opinions in *Friends of the Vietnam Veterans Memorial v. Kennedy,* 325 U.S. App. D.C. 151, 116 F.3d 495, 498 (1997) and *ISKCON of Potomac, Inc. v. Kennedy,* 314 U.S. App. D.C. 63, 61 F.3d 949 (1995), the additional claims of Plaintiffs Henderson and Phillips will be futile. The Court of Appeals has made it abundantly clear that the Park Service's absolute ban on the sale of T-shirts passes constitutional muster under the First Amendment. The Court of Appeals afforded deference to the Park Service's judgment that a complete ban was necessary to achieve its purpose. According to the Court of Appeals, the judiciary did not have "the authority to replace the Park Service as the manager of the Nation's parks or ... the competence to judge how much protection of parklands is wise and how that level of conservation is to be attained." *Friends of the Vietnam Veterans Memorial v. Kennedy,* 325 U.S. App. D.C. 151, 116 F.3d 495, 498 (1997) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 299, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). As a result, the Court of Appeals held that it would not consider "what the Park Service could have done" to limit its regulation so that it would be less restrictive of the Plaintiffs' speech. Id. Under this reasoning, the Park Service's regulation would clearly withstand any level of

judicial scrutiny. Accordingly, this Court, after reconsidering its grant of leave for Plaintiffs to file their amended complaint, will now deny the Plaintiffs' request for leave to amend their complaint. The Court will also grant Defendants' motion to dismiss the case as to all Plaintiffs.

In its opinion in this case and its earlier opinion in ISKCON, the Court of Appeals announced that while Plaintiffs could not sell their wares on the Mall, they could give them away. This distinction between commercial and non-commercial speech has posed a significant problem for those who want to invoke this part of the Court of Appeals' decision and give away their T-shirts. At the recent hearing on Defendants' motions, Plaintiffs raised this issue and have asked the Court to define the permissive bounds of T-shirt giveaways.

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993), the Supreme Court made it clear that there is little distinction between commercial and non-commercial speech vis a vis the First Amendment. There, the Court enjoined a city ordinance banning newsracks containing commercial handbills. According to the Court, "Cincinnati's categorical ban on commercial newsracks place[s] too much importance on the distinction between commercial and noncommercial speech." *Id.* at 424. The Court rejected the view that commercial speech only has a low value. *Id.* at 418-19. "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." *Id.* at 419. Because the ban did not apply to newsracks containing newspapers, there was not a reasonable fit between the ban and the city's interests in aesthetics and safety. "Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is

equally unattractive." *Id.* at 425. The Court held that the "very basis for the regulation is the difference between ordinary newspapers and commercial speech." *Id.* at 429. This was a content-based distinction because the city improperly singled out commercial speech for the ban.

According to the Court of Appeals, the *Discovery Network* case is not controlling and under the facts in both *ISKCON* and the instant case, a distinction between commercial and non-commercial speech must be recognized.[1] Under its court validated regulations, the Park Service permits the sale of newspapers and other items on the Mall for profit but bans the sale of T-shirts because they are deemed to be "commercial."[2] The opinion of the Court of Appeals in Friends recognizes Plaintiffs' absolute right to give away their T-shirts on the nation's parkland. The Court of Appeals' decision in ISKCON further supports this view.

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1. Although the Court of Appeals equates commercialism with the solicitation of money, commercialism comes in many different forms and cannot be reduced to such a simple formula. It is the big commercial producer that is most able to afford to give away free T-shirts. Often this is done as a form of promotional advertising, a calculated venture to increase profits in the long-term. Under the reasoning of the Court of Appeals, commercial ventures such as these would be deemed non-commercial merely because no money passes hands.

2. Although the Park Service regulation treats the T-shirt as a lower form of expression than newspapers, buttons, and bumper stickers, this Court believes that "the T-shirt has become a unique means of spreading messages over the last twenty years. Unlike a book or pamphlet, the T-shirt not only carries a message, it also turns the wearer into a 'human billboard'. *Friends*, 899 F. Supp. at 684.

In ISKCON, the Court of Appeals upheld the Park Service regulation as applied to the sale of audio tapes and beads: "ISKCON's members may display and give the audio tapes and beads to members of the public so long as they do not try to exact a payment or request a donation in exchange for them." *ISKCON,* 61 F.3d at 958. In Friends, the Court of Appeals declared that "Of course, there is nothing to stop appellees from giving away their expressive T-shirts on the Mall (or selling them near the Mall)." *Friends,* 325 U.S. App. D.C. 151, 116 F.3d 495 at 497. The Court of Appeals also made clear that the Plaintiffs may still solicit donations on the Mall, holding that a Park Service regulation banning in-person solicitation of immediate donations was unconstitutional. *ISKCON*, 61 F.3d at 956.

Plaintiffs claim the Park Service is acting contrary to the Court of Appeals' decisions in not giving full force and effect to the "give away" language. The Park Service claims that the way it has been enforcing this aspect of the Court of Appeals' opinions is pursuant to its notice adopting the ban on the sale of T-shirts:

> Restricted merchandise cannot be "given away" and a "donation accepted" or one item "given away" in return for the purchase of another item; such transactions amount to sales.

60 Fed. Reg. at 17648 (1995).

Despite this language, whether someone is giving away something or not is a fact-specific determination. Such a determination preferably should await a case where the issue has been appropriately raised. This should come soon since the Park Service has arrested a number of the message bearing T-shirt vendors for violating the Park Service ban even though those

arrested contend they were doing nothing more than giving away their T-shirts.[3] While Plaintiffs would like a bright line between a "give away" and a sale, at this point, the Court is not the appropriate forum to make such a distinction. In order to avoid the admonition of the Court of Appeals that the role of the judiciary is not "to replace the Park Service as the manager of the Nation's parks," the Court will not provide an advisory opinion. The time to rule on the legality of the Park Service's regulation will come when the criminal charges against the T-shirt vendors come to trial.

This nation's citizens appreciate the importance of the Park Services' work in maintaining the beauty of the Mall area. In large part because of the attractiveness of its parklands, Washington, D.C. remains one of the most beautiful capitals in the World. That being said, the constitutional rights of this nation's citizens also require protection.[4] The "message bearing

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3. On September 18, 1997, approximately fourteen individuals, including the Plaintiffs, were arrested on the Mall for violating the Park Service regulation. Plaintiffs claim that while they were giving away the T-shirts and soliciting donations, there was no quid pro quo between these two activities. Plaintiffs allege that without any warning, they were arrested, taken into custody (with handcuffs), fingerprinted, photographed, held for approximately four hours, and cited for violating the Park Service regulations. Further, their T-shirts and other materials were confiscated. (Statements made in open court on October 20, 1997).

4. The principal reason given by the Park Service for banning T-shirt sales on the Mall is that such sales create a "flea market" atmosphere. Pursuant to the preliminary injunction issued by this Court, the sale of T-shirts was confined to discreet portions of the Mall. When the Court made an inspection to ensure that its decree was being faithfully discharged, it did not observe the excessive claims

T-shirt people" have now been before this Court since September of 1995. It is abundantly clear that the vast majority of them are law-abiding citizens who are committed to the causes they espouse. They are not wealthy and often are just barely able to eke out an existence. Despite their lack of wealth and in many instances, their poverty-level existence, they have a right to be heard. It is hoped that the Park Service will listen to their voices in the enforcement of its regulations.

An appropriate order accompanies this opinion.

October 28, 1997
Stanley Sporkin
United States District Judge

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made by the anti-T-shirt proponents. Although the Court of Appeals counsels the judiciary to defer to the judgment of the Park Service, the courts have a constitutional duty to step in when any agency restricts more speech than is necessary. The Court does not believe that its inspection of the Mall supports the contention that only an outright ban is necessary to preserve the beauty of the parkland. Instead, a reasonable time, place, or manner restriction could easily be devised to preserve the beauty of the parkland consistent with the "T-shirt people's" rights under the First Amendment.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Filed December 1, 1998

No. 97-5358

Augustine David Henderson,
Appellant

v.

Robert A. Stanton, Director of the
National Park Service and
Robert E. Langston,
Appellees,

Consolidated with 97-5359

JUDGMENT

These appeals were considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the attached memorandum, it is

ORDERED and ADJUDGED that the district court's order filed October 29, 1997 be reversed and that the cases be remanded for further proceedings consistent with the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(2).

MEMORANDUM

The appellants, Augustine David Henderson and Gregory Francis Phillips, filed *pro se* complaints challenging the constitutionality of a National Park Service regulation that limited sales on federal parkland in the National Capitol region to "books, newspapers, leaflets, pamphlets, buttons and bumper stickers." 36 C.F.R. § 7.96(k)(2). The two reached temporary agreements with the Park Service that pending the district court's decision in *Friends of the Vietnam Veterans Memorial v. Kennedy* each would be permitted to sell T-shirts from one location on the National Mall. The district court ruled that the regulations were in violation of the First Amendment. *See Friends of the Vietnam Veterans Memorial v. Kennedy, 899 F. Supp. 680, 688 (1995).* This court reversed, finding indistinguishable our decision in *ISKCON of Potomac v. Kennedy, 314 U.S. App. D.C. 63, 61 F.3d 949 (1995),* which upheld the Park Service regulation as applied to the sale of religious beads and cassettes. *See Friends of the Vietnam Veterans Memorial v. Kennedy, 325 U.S. App. D.C. 151, 116 F.3d 495, 497-98 (1997).*

Based upon the holding in *Friends*, the Park Service moved to dismiss the appellants' complaints. The appellants, now represented by counsel, sought to amend their complaints in order to raise claims under the Free Speech Clause, the Religious Freedom Restoration Act, the Free Exercise Clause, the Freedom of the Press Clause, the equal protection component of the Due Process Clause in the Fifth Amendment, and the Administrative Procedure Act. The district court, in a single, cursory paragraph, denied the motion to amend because "the additional claims ... will be futile." *Friends of the Vietnam Veterans Memorial v. Kennedy, 984 F. Supp. 18, 20 (1997).* According to the district court, in view of this court's opinions

in *Friends* and *ISKCON* "the Park Service's regulation would clearly withstand any level of judicial scrutiny." *Id.*

Under Federal Rule of Civil Procedure 15(a), leave to amend "shall be freely given when justice so requires." We review the denial of a motion to amend for abuse of discretion, "requiring only that the court base its ruling on a valid ground." *James Madison Ltd. v. Ludwig, 317 U.S. App. D.C. 281, 82 F.3d 1085, 1099 (1996); see also Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1208 (D.C. Cir. 1996)* ("It is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as 'undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.'" (quoting *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962))).* The district court's opinion invokes the permissible ground of futility, but provides no explanation of why the appellants' specific claims are futile beyond the overly broad speculation that the challenged regulations will survive any conceivable standard of review. When a district court denies a motion to amend, it must do more than name a reason; it must explain its reason and that reason must be sufficient. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1084 (D.C. Cir. 1998).*

The district court did not explain its reason in this case. In particular, neither the RFRA nor the equal protection claim was raised or resolved in this court's *Friends* and *ISKCON* decisions; similarly, neither claim is obviously susceptible to a motion to dismiss. Perhaps these and the other claims are indeed futile, but we cannot find a reasoned explanation in a simple reference to futility, "particularly in light of the policy in favor of hearing cases on their merits." *Id.* Accordingly, we remand this case for further proceedings consistent with this memorandum.

Two other points bear mentioning. First, the district court implicitly held that the appellants had lost their right to amend their complaints despite the failure of the Park Service to file a responsive pleading. *See* Fed. R. Civ. P. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served ..."). Because of the procedural posture of this case, we need not decide whether this was error, as the appellants contend. If the claims that the appellants seek to add are futile, then they will not survive the pending motion to dismiss. If the claims are not futile, then the district court should grant the appellants' motion to amend under the liberal standard in Rule 15. The same analysis makes it unnecessary to address the appellants' claim that the district court failed to read the *pro se* complaints liberally to encompass the very claims contained in the motion to amend.

Second, as guidance to the district court on remand, we wish to respond to an argument the Government made in its brief on appeal. Apparently recognizing the district court's error in failing to explain its futility holding, the Government argued that an amendment is futile if it would not survive a dispositive motion -- *i.e.*, either a motion to dismiss *or* a motion for summary judgment. It is indeed clear that an amendment that would not survive a motion to dismiss is futile. *See James Madison, 82 F.3d at 1099.* No precedent, however, supports the proposition that in a case such as this, in which discovery has not occurred and no summary judgment motion is pending, summary judgment provides the appropriate standard for determining whether an amendment would be futile. *See Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996)* (distinguishing between motions to amend filed prior to motions for summary judgment and those filed subsequently when selecting appropriate standard for futility); *see also Bauchman*

v. West High Sch., 132 F.3d 542, 546, 561 (10th Cir. 1997) (applying Rule 56 standard to motion to amend only after having held motion in abeyance pending discovery on claims in amendment); *Wilson v. American Trans Air, Inc., 874 F.2d 386, 392 (7th Cir. 1989)* (applying Rule 56 standard to motion to amend when made three months after defendant filed for summary judgment).

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Augustine David Henderson, et al.,
Plaintiffs,

v.

Robert A. Stanton, et al.,
Defendants.

Civil Action Nos. 95-850, 95-1081 (SS)

Decided November 23, 1999
Filed November 24, 1999

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. Plaintiffs Augustine David Henderson and Gregory Francis Phillips challenge a National Park Service regulation limiting commercial activity on federal parkland in the National Capital Region to the sale of "books, newspapers, leaflets, pamphlets, buttons and bumper stickers." 36 C.F.R. § 7.96(k)(2). Plaintiffs protest the regulation's proscription against the sale of message-bearing t-shirts as a violation of the First and Fifth Amendments, the Religious Freedom Restoration Act, *42 U.S.C. § 2000bb* et seq., and the Administrative Procedures Act, *5 U.S.C. § 501* et seq.

On September 12, 1995, this Court in a related case concluded that the regulation was in violation of the First Amendment and enjoined defendants from enforcing the regulation. *Friends of the Vietnam Veterans Memorial v.*

Kennedy, 899 F. Supp. 680 (D.D.C. 1995). The defendants in that case appealed. While the appeal was pending, the parties entered into a stipulation permitting the plaintiffs in that case, along with other non-party t-shirt vendors, to continue such sales until the appeal was decided.

The Court of Appeals found the amended regulation to be constitutionally valid and reversed this Court's ruling. *Friends of the Vietnam Veterans Memorial v. Kennedy (Friends I), 325 U.S. App. D.C. 151, 116 F.3d 495 (D.C. Cir. 1997).* Following the Court of Appeals' decision, the National Park Service issued four notices dated August 18, 1997, August 21, 1997, August 22, 1997, and September 5, 1997, apprising the public that the constitutionality of the regulation had been upheld and that the regulation would be enforced on a prospective basis.

The plaintiffs in this case had each filed their respective complaints against defendants approximately one month subsequent to the filing of the complaint in Friends. After the Court of Appeals rendered its decision, plaintiffs moved for leave to amend and supplement their complaints to add new claims under the Religious Freedom Restoration Act, the Administrative Procedures Act, and the First and Fifth Amendments. This Court granted plaintiffs' motion. Defendants moved for reconsideration of the Court's decision and for dismissal of plaintiffs' cases in light of the Court of Appeals' decision. Upon reconsideration, this Court denied plaintiffs' request for leave to amend on the basis that the amendment would be futile, in view of the Court of Appeals' far-reaching and comprehensive decision in Friends I, and granted defendants' motion to dismiss plaintiffs' cases. *Friends of the Vietnam Veterans Memorial v. Kennedy, 984 F. Supp. 18 (D.D.C. 1997).* In an unpublished opinion, the Court of Appeals remanded and directed this Court to consider plaintiffs' claims.

Henderson v. Stanton, 335 U.S. App. D.C. 318, 172 F.3d 919 (D.C. Cir. 1998). Defendants have since withdrawn their opposition to plaintiffs' motion to amend the complaint so that the amended complaint could be filed and the case decided on the merits.

I. BACKGROUND

For many years, the National Mall, a tract of federal parkland situated in the heart of Washington, D.C. and surrounded by a number of this nation's most prestigious museums, has been a sightseeing Mecca, a place for individuals and groups to demonstrate and protest, as well as a commercial site for vendors, both individuals and groups, engaged in the sale of a variety of items, including message-bearing t-shirts.

On May 18, 1994, the National Park Service ("NPS"), which oversees the National Mall pursuant to statutory mandate under *16 U.S.C. § 1,* issued a notice of proposed rule making to amend 36 C.F.R. § 7.96(k)(2). The NPS sought to amend the regulation to restrict commercial sales made on the National Mall to "books, newspapers, leaflets, and pamphlets." National Capital Region Parks; Sales, *59 Fed. Reg. 25,855, 25,859 (1994).* The NPS initiated the rule making as part of its effort to reduce the "discordant and excessive commercialism, as well as degraded aesthetic values," resulting from rampant commercial activity on the National Mall. *Id. at 25,856.*

The NPS issued its final regulation on April 7, 1995. The amended regulation limited commercial sales on federal parkland in Washington, DC to "books, newspapers, leaflets, pamphlets, buttons and bumper stickers." National Capital Region Parks; Special Regulations, *60 Fed. Reg. 17,639(1995).* The NPS explicitly banned t-shirt sales from the regulation because it found that "the basic problem of commercialization

and attendant adverse impacts on park values is caused by T-shirt sales. [The NPS] also concluded that the problem cannot be abated by other than a ban on such sales on park land." *Id. at 17,642.*

Plaintiffs are evangelical Christians. Pursuant to their religious beliefs plaintiffs distribute food and other essentials to the needy in the city, and conduct ministerial outreaches through preaching, singing, teaching, and musical and dramatic performances. In addition, they present the gospel message and oversee the coordination of these and other religious activities by others.

Their religious activities also include the communication of the gospel by all available means. To do so they write, print, and distribute vast numbers of leaflets, handbills, broadsides, and pamphlets. Plaintiffs rely extensively on the sale of message-bearing t-shirts to "spread the word." Because of the expenses associated with printing t-shirts, plaintiffs are unable to distribute them free of cost.

II. ANALYSIS

Pursuant to Rule 56(c) of the Fed. R. Civ. P., summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

A motion to dismiss may be granted if it appears that plaintiffs can prove no set of facts that would entitle them to relief. *In re Swine Flu Immunization Prods. Liability Lit., 279 U.S. App. D.C. 366, 880 F.2d 1439, 1442 (D.C. Cir. 1989).*

A. *The Religious Freedom Restoration Act*

Plaintiffs contend that 36 C.F.R. § 7.96(k)(2), to the extent that it prohibits them from selling message-bearing t-shirts, constitutes a substantial burden on their exercise of religion in violation of RFRA. Congress enacted RFRA following the Supreme Court's decision in *Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990),* which "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *42 U.S.C. § 2000bb*(a)(4). RFRA restores the application of the compelling state interest test to the free exercise analysis, which had developed in *Wisconsin v. Yoder, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972),* and *Sherbert v. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963). 42 U.S.C. § 2000bb*(b)(1).

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *42 U.S.C. § 2000bb-1.*[1] Plaintiffs bear the initial burden of establishing that defendants have substantially burdened their free exercise of religion, *Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 24 (D.D.C. 1999),* by placing a substantial

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1. In *City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997),* the Supreme Court held that by enacting RFRA, Congress had exceeded its enforcement power under § 5 of the Fourteenth Amendment to the extent RFRA was made applicable to the states. Since defendants do not contest the applicability of RFRA to the federal government, the Court will assume its applicability to the federal government for purposes of this case.

burden "on the observation of a central religious belief or practice," *Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989)*, or "'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Branch Ministries, 40 F. Supp. 2d at 25* (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981))*.[2] If and only if plaintiffs can demonstrate a substantial burden are defendants then required to show that the substantial burden embodied in the regulation furthers a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.*

Plaintiffs contend that the regulation barring the sales of t-shirts imposes a substantial burden on their free exercise of their religion, because it precludes them from engaging in their religious duty to communicate the gospel by all available means. The Court does not question that this is a deeply and sincerely held belief that is central to plaintiffs' evangelical mission. However, in view of the Court of Appeals' decision in Friends I, this Court is unable to discern how this belief is substantially burdened by a regulation barring t-shirt sales on federal parkland in Washington, DC. As the Court of Appeals found, plaintiffs may distribute their t-shirts on the *National Mall for free. 116 F.3d at 497.* While this Court, in considering the Friends I case and the relationship of sales of message-bearing t-shirts to the First Amendment, did not believe that the sale of message-

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2. The legislative history of RFRA makes clear that the courts may look to pre-RFRA cases for assistance in determining the scope of substantial burden, compelling governmental interest, and least restrictive means when engaged in a RFRA analysis. See *Adams v. Commissioner of Internal Revenue, 170 F.3d 173, 176-77 (3d Cir. 1999).*

bearing t-shirts should render plaintiffs' activities outside the scope of First Amendment protection, the Court of Appeals did not subscribe to that view. It did not find First Amendment protection for the commercial aspect of the activity. *116 F.3d at 497.* Applying that principle here, since plaintiffs may give away their message-bearing t-shirts for free, the amended regulation does not impose an impermissible burden on plaintiffs' rights under RFRA. If plaintiffs are unable to disseminate their message by t-shirts on federal parkland in Washington, DC, it is not on the basis that the regulation bars the distribution of message-bearing t-shirts, but on the basis that plaintiffs lack the financial resources to distribute their t-shirts for free.

Because the Court finds that the regulation does not impose a substantial burden on plaintiffs' free exercise of their religion pursuant to the law as enunciated by this Circuit, the Court need not address whether the government can demonstrate a compelling interest in imposing such burden and whether it did so in the least restrictive means possible.

B. *The Fifth Amendment's Equal Protection Clause*

Plaintiffs have also bottomed their amended complaint on the basis of a denial of their equal protection rights. The right to equal protection under the law is made applicable to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954).*

Plaintiffs claim that since the amended regulation was promulgated, they have observed t-shirt sales in the vicinity of the Mall. This observation has not been substantiated. Indeed, the contrary has been shown. In the Second Declaration of Richard Merryman, Chief of the Division of Park Programs,

National Capital Parks-Central in the National Capital Region of the National Parks Service, which was submitted in support of defendants' motion, Merryman states that the NPS did not extend permission for such sales and that enforcement action against violators has been taken. Plaintiffs have not disputed these findings. Accordingly, the Court finds no violation to plaintiffs' right to equal protection under the law.

C. *The Administrative Procedures Act*

Plaintiffs claim that defendants violated the APA with respect to the issuance of the four notices following the Court of Appeals' decision upholding the constitutionality of the amended regulation in Friends I. In their amended complaint, plaintiffs allege that these four notices were promulgated by the NPS without prior notice and comment as required by the APA.

The notices dated August 18, 1997 and August 22, 1997, announce the Court of Appeals' decision in Friends I and apprise the public that the provisions of the regulation will be enforced. The notices dated August 21, 1997 and September 5, 1997, discuss the scope of permissible sales transactions under the regulation. These two notices announce that the items prohibited from sale under the amended regulation may not be sold via an "artifice," which the notices illustrate by example as the giving away of a prohibited item in connection with the sale of a permitted one.

To the extent the four notices reiterate the provisions of the regulation in dispute or announce the Court of Appeals' decision in Friends I, the Court finds that notice and comment are not required. They do not promulgate a new rule of general application but only restate a regulation whose promulgation pursuant to the APA is not challenged by plaintiffs. The notices also announce the decision of the Court of Appeals upholding

the constitutionality of the regulation, which is not a matter that is subject to notice and rule making requirements.

With respect to the explanations of permissible sales transactions appearing in the August 21, 1997 and September 5, 1997 notices, the Court finds that they reflect the language appearing in the preamble to the final rule set forth in the Federal Register, which provides that "attempts to offer or sell items, whether directly or by the use of an artifice, other than books, newspapers, leaflets, pamphlets, buttons and bumper stickers on park land are prohibited. For example, restricted merchandise cannot be 'given away' and a 'donation accepted' or one item 'given away' in return for the purchase of another item; such transactions amount to sales." *60 Fed. Reg. at 17,648.*

The preamble, which gives official interpretive guidance to the regulation, should be accorded due deference unless clearly erroneous or contrary to the terms of the regulation. See *Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 236 n.6 (S.D.N.Y. 1996).* Notably, the contested language in the preamble does not contravene the language of the regulation, see *National Propane Gas Ass'n v. United States Dep't of Transp., 43 F. Supp. 2d 665, 683 (N.D. Tex. 1999),* and illustrates what amounts to permissible and impermissible sales under the regulation and the types of evasive tactics by putative vendors that will not be tolerated by the NPS. The Court will not disturb the official agency interpretation of the regulation set forth in the preamble and referenced in the two notices by invoking yet another round of rule making.[3]

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3. Plaintiffs also submit that the definition of "sales" is subject to rule making because it is "of a highly controversial nature." 36 C.F.R. § 1.5. As already discussed, the need to submit the sales definition for notice and comment rule making is obviated by the fact that the

D. *The First Amendment Claims*

Plaintiffs also challenge the constitutionality of the regulation as a violation of the Free Speech, Free Press, and Free Exercise Clauses of the First Amendment. Their free speech and free press claims are a recasting of First Amendment arguments that have been previously made before this Court and the Court of Appeals, and plaintiffs have presented no new grounds for reconsideration of this issue. Since the Court of Appeals fully addressed the issue, this Court believes that nothing further can be gained by a further discussion of these claims. As for plaintiffs' claim styled "hybrid right of free exercise," because the Court finds that plaintiffs' other First Amendment claims fail, plaintiffs do not have a viable cause of action on this claim and it will be dismissed. See *Employment Div., 494 U.S. at 872-73.*

III. CONCLUSION

Although the Court will grant defendants' motion, it remains sympathetic to plaintiffs' claims, as noted in its decision in Friends I. This is because the Court of Appeals in a detailed opinion upheld the NPS regulation at issue here. It would be incongruous for this Court to now find that these plaintiffs would have the right to sell their wares on the National Mall but preclude the many equally deserving plaintiffs in the Friends I litigation from delivering their messages. As a nation that believes in the rule of law, the final authority having spoken, the litigation on the validity of defendants' amended regulation must come to an end.

An appropriate Order accompanies this Memorandum

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definition appeared in the preamble to a final rule that had already been submitted for notice and comment.

Opinion.

11/23/99
Date
Stanley Sporkin
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Augustine David Henderson, et al.,
Plaintiffs,

v.

Robert A. Stanton, et al.,
Defendants.

Civil Action Nos. 95-850, 95-1081 (SS)

Decided November 23, 1999
Filed November 24, 1999

ORDER

This matter is before the Court on defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motion be **GRANTED**.

11/23/99
Date
Stanley Sporkin
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 2, 2001
No. 00-5070

AUGUSTINE DAVID HENDERSON,
APPELLANT

V.

ROGER A. KENNEDY, ET AL.,
APPELLEES

Consolidated with
No. 00-5071

Before: Henderson, Randolph, and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed August 8, 2001, and of the opposition thereto, it is,

ORDERED that the petition be denied, as is more fully set for th in the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Nancy G. Dunn
Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 2, 2001
No. 00-5070

AUGUSTINE DAVID HENDERSON,
APPELLANT

v.

ROGER A. KENNEDY, ET AL.,
APPELLEES

Consolidated with
No. 00-5071

Before: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Nancy G. Dunn
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 2, 2001
No. 00-5070

AUGUSTINE DAVID HENDERSON,
APPELLANT

v.

ROGER A. KENNEDY, ET AL.,
APPELLEES

Consolidated with
No. 00-5071

Appeals from the United States District Court
for the District of Columbia
(No. 95cv00850)
(No. 95cv01081)

Before: Henderson, Randolph, and Garland, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Robert A. Bonner
Deputy Clerk

Date: June 26, 2001

Opinion for the Court filed by Circuit Judge Randolph.

APPENDIX J

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Const. amend. I.

APPENDIX K

TITLE 42 U.S.C. § 2000bb

Title 42 U.S.C. § 2000bb-1

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious

exercise is substantially burdened by government.

42 U.S.C. § 2000bb-2

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Title 42 U.S.C. § 2000bb-3

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the

Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

42 U.S.C. § 2000bb(4)

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause").

Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

APPENDIX L

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that

substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the

Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended--

(1) by inserting `the Religious Land Use and Institutionalized Persons Act of 2000,' after `Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation

would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may

avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or

in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the `Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term `granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking `a State, or a subdivision of a State' and inserting `or of a covered entity';

(2) in paragraph (2), by striking `term' and all that follows through `includes' and inserting `term `covered entity' means'; and

(3) in paragraph (4), by striking all after `means' and inserting `religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking `and State'.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term `claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term `demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term `Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term `government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term `land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term `program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of

1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term `religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

APPENDIX M

36 C.F.R. § 7.96(k)

(k) Sales.

(1) No sales shall be made nor admission fee charged and no article may be exposed for sale without a permit except as noted in the following paragraphs.

(2) No merchandise may be sold during the conduct of special events or demonstrations except for books, newspapers, leaflets, pamphlets, buttons and bumper stickers. A permit is required for the sale or distribution of permitted merchandise when done with the aid of a stand or structure. Such stand or structure may consist of one table per site, which may be no larger than 2 ½ feet by 8 feet or 4 feet by 4 feet. The dimensions of a sales site may not exceed 6 feet wide by 15 feet long by 6 feet high. With or without a permit, such sale or distribution is prohibited in the following areas:

(i) Lincoln Memorial area which is on the same level or above the base of the large marble columns surrounding the structure, and the single series of marble stairs immediately adjacent to and below that level.

(ii) Jefferson Memorial area enclosed by the outermost series of columns, and all portions on the same levels or above the base of these columns.

(iii) Washington Monument area enclosed within the inner circle that surrounds the Monument's base.

(iv) The interior of all park buildings, including, but not limited to, those portions of Ford's Theatre administered by the National Park Service.

(v) The White House Park area bounded on the north by H Street, NW; on the south by Constitution Avenue, NW; on the west by 17th Street, NW; and on the east by 15th Street, NW; except for Lafayette Park, the White House sidewalk (the south

Pennsylvania Avenue, NW sidewalk between East and West Executive Avenues) and the Ellipse; Provided, however, that the free distribution of literature conducted without the aid of stands or structures, is permitted on East Executive Avenue.

(vi) Vietnam Veterans Memorial area extending to and bounded by the south curb of Constitution Avenue on the north, the east curb of Henry Bacon Drive on the west, the north side of the north Reflecting Pool walkway on the south and a line drawn perpendicular to Constitution Avenue two hundred (200) feet from the east tip of the memorial wall on the east (this is also a line extended from the east side of the western concrete border of the steps to the west of the center steps to the Federal Reserve Building extending to the Reflecting Pool walkway); Provided, however, that the free distribution of literature conducted without the aid of stands or structures, is permitted on the Constitution Avenue and Henry Bacon Drive sidewalks adjacent to the Vietnam Veterans Memorial.

(3) Persons engaged in the sale or distribution of printed matter under this section shall not obstruct or impede pedestrians or vehicles, harass park visitors with physical contact, misrepresent the purposes or affiliations of those engaged in the sale or distribution, misrepresent whether the printed matter is available without cost or donation.